United States Court of Appeals

for the Second Circuit

PETITIONER'S BRIEF

No. 75-4020

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United States Court of Appeals

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

DUNKIRK MOTOR INN, INC.,
d/b/a HOLIDAY INN OF DUNKIRK-FREDONIA,
Respondent.

On Application for Enforcement of an Order of
The National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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**On Application for Enforcement of an Order of
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BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD

STATEMENT OF THE ISSUE PRESENTED

Whether the Board properly found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union certified by the Board as the majority representative of its employees, and by refusing to furnish necessary and relevant information requested by the Union.

STATEMENT OF THE CASE

This case is before the Court on the application of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*), for enforcement of its order (A. 12-14)[1] issued against Dunkirk Motor Inn (herein "the Company") on November 22, 1974, and reported at 215 NLRB No. 29.[2] This Court has jurisdiction of the proceeding, the unfair labor practices having occurred in Dunkirk, New York, where the Company operates a motel and restaurant which is part of a chain of ten Holiday Inns owned by Federated Home and Mortgage Company, Inc. of Pennsylvania (herein "Federated") (A. 81).

I. THE BOARD'S FINDINGS OF FACT

Briefly, the Board found that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union[3] certified by the Board as the majority representative of its employees in an appropriate unit, and by refusing to furnish information requested by the Union which was necessary and relevant to collective bargaining. The facts upon which the Board's findings are based are summarized below.

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[1] "A." references are to the printed Appendix. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

[2] As the Board's order is based on findings made in a representation proceeding conducted under Section 9 of the Act, the record in that proceeding (Board Case No. 3-RC-5678) is part of the record before this Court pursuant to Section 9(d) of the Act.

[3] Amalgamated Meatcutters and Butcher Workmen of North America, Local 34, AFL-CIO.

A. The representation proceeding

Pursuant to a Stipulation for Certification Upon Consent Election, an election was conducted on May 11, 1973, among the Company's employees in a stipulated bargaining unit (A. 5).[4] The election resulted in a vote of 20 to 18 in favor of the Union, with 5 challenged ballots which were determinative of the election (A. 5).[5] The Company thereafter filed two timely objections to conduct affecting the results of the election. On June 8, 1973, the Acting Regional Director issued a Report on Challenges and Objections in which he recommended that the challenges be sustained, that the objections be overruled, and that the Union be certified as the bargaining representative of the unit employees (A. 48-57).

The Company filed timely exceptions to the Acting Regional Director's findings. It excepted only to the Acting Regional Director's overruling of one of its two objections and to his findings that Nichols, Straight and Hancock were supervisors and hence ineligible to vote.

On August 22, 1973, the Board issued a Decision and Order Directing Hearing, in which it adopted the Acting Regional Director's recommendations as to the objections and as to two of the challenges and

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[4] The stipulated unit was as follows (A. 9):

> All waitresses, kitchen help, desk clerks, housemaids, busboys, cooks, dishwashers, maintenance, and bartenders, including regular part-time employees and other housekeeping personnel; excluding all office clerical employees, secretaries, sales personnel, professional employees, guards, and all other employees and supervisors as defined in the Act.

[5] The ballots challenged were those of John Abbado, Fleury Richmond, Sandra Ann Nichols, John Leslie Straight and Ruth Alice Hancock (A. 5).

directed a hearing on the three challenged ballots of Nichols, Straight and Hancock (A. 57-60).

On October 25, 1973, after a hearing in which the Company and the Union participated, the Hearing Officer issued a report in which he found that Straight was an employee and Nichols and Hancock were supervisors (A. 61-69). Accordingly, he recommended that the challenge to Straight's ballot be overruled, that the challenges to the ballots of Nichols and Hancock be sustained, that a revised tally be issued and that the Union be certified (A. 69). The Company excepted to the Hearing Officer's report, reasserting its Objection 1 and arguing that Nichols and Hancock were employees rather than supervisors.

On June 12, 1974, the Board issued a Supplemental Decision and Certification of Representative (211 NLRB No. 56) in which it adopted the Hearing Officer's findings and recommendations sustaining the challenges to the ballots of Nichols and Hancock and it affirmed the Acting Regional Director's finding that the Union's offer to waive initiation fees, alleged in Objection 1, did not interfere with the election (A. 69-74).[6] Accordingly, the Board certified the Union, based on the Acting Regional Director's tally of ballots, which showed that the Union had received a majority of the valid votes cast (A. 72, 73-74).[7]

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[6] Pursuant to the provisions of Section 3(b) of the Act, as amended, the Board delegated its authority to a three-member panel composed of Members Fanning, Penello and former Chairman Miller. Former Chairman Miller dissented from the majority opinion with respect to the supervisory status of Hancock (A. 74-77).

[7] Although the Board agreed with the Hearing Officer's conclusion that Straight was an employee and therefore eligible to vote, it rejected the recommendation that Straight's ballot be opened and counted, as his vote would not affect the results of the election (A. 5).

B. The unfair labor practice proceeding

By letter dated June 17, 1974, the Union requested that the Company enter into collective bargaining negotiations with it as the certified representative of the Company's employees in an appropriate unit (A. 9). It further requested that the Company furnish the Union with information relevant to collective bargaining, including a list of the employees in the bargaining unit, their addresses, starting dates, rates of pay and classifications; names and addresses of employees in the bargaining unit on layoff, sick leave, or other leave; a copy of any health and welfare, pension, savings, and/or disability plans the Company has; and a copy of the Company's rules or practices in effect (A. 9-10). The Company refused to accede to the Union's requests. The General Counsel thereafter issued a complaint alleging that the Company had violated Section 8(a)(5) and (1) of the Act (A. 3, 20-25). The Company's answer admitted in part and denied in part the allegations of the complaint (A. 4, 25-28).

On August 19, 1974, the General Counsel filed with the Board a Motion to Transfer Proceeding to Board, to Strike Respondent's Answer in Part, to Strike Alleged Affirmative Defenses, and for Summary Judgment (A. 4, 29-33).[8] On August 28, 1974, the Board issued an order transferring the proceedings to the Board and a Notice to Show Cause why the General Counsel's Motion for Summary Judgment should not be granted (A. 4, 37-38). The Company thereafter filed a response to the Notice to Show Cause, reiterating its position that Objection 1 was improperly overruled and that Nichols and Hancock had been erroneously found to be supervisors.

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[8] The Union thereafter joined in the General Counsel's motion (A. 4).

II. THE BOARD'S CONCLUSION AND ORDER

The Board found that all the issues raised by the Company in the unfair labor practice proceeding were or could have been litigated in the prior representation proceeding and, accordingly, the Board granted the General Counsel's motion for summary judgment (A. 6-7). Thus, the Board concluded that the Company violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the Union, and by refusing to furnish necessary and relevant information requested by the Union.[9]

The Board's order requires the Company to cease and desist from the unfair labor practices found and from in any like or related manner interfering with, restraining or coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act (A. 13). Affirmatively, the order requires the Company to bargain with the Union upon request, to provide the necessary and relevant information requested by the union, and to post appropriate notices (A. 13-14).[10]

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[9] Chairman Miller dissented from the Section 8(a)(5) finding for the reasons stated in his dissent in the underlying representation case (*supra*, p. 4, n. 6, A. 14-15).

[10] In order to insure that the employees are accorded the services of their selected bargaining agent for the period provided by law, the Board construed the initial period of the Union's certification as beginning on the date the Company commences to bargain in good faith (A. 11). See *N.L.R.B. v. Commerce Co.*, 328 F.2d 600, 601 (C.A. 5, 1964), cert. denied, 379 U.S. 817; *N.L.R.B. v. Burnett Construction Co.*, 350 F.2d 57, 60 (C.A. 10, 1965).

ARGUMENT

THE BOARD PROPERLY FOUND THAT THE COMPANY VIOLATED SECTION 8(a)(5) AND (1) OF THE ACT BY REFUSING TO BARGAIN WITH THE UNION CERTIFIED BY THE BOARD AS THE MAJORITY REPRESENTATIVE OF ITS EMPLOYEES AND BY REFUSING TO FURNISH NECESSARY AND RELEVANT INFORMATION REQUESTED BY THE UNION

The Company admittedly has refused to bargain with the Union, which has been certified by the Board as the exclusive bargaining representative in an appropriate unit. This refusal constitutes a violation of Section 8(a)(5) and (1) of the Act unless, as the Company contends, the certification is invalid. *Polymers, Inc. v. N.L.R.B.*, 414 F.2d 999, 1001 (C.A. 2, 1969), cert. denied, 396 U.S. 1010. The sole issue presented by the Company's conceded refusal to bargain is whether the Board has acted within the "wide degree of discretion" (*N.L.R.B. v. A. J. Tower Co.*, 329 U.S. 324, 330 (1946)) entrusted to it by Congress in resolving questions arising during the course of representation proceedings. As this Court recently stated, "The conduct of representation elections is the very archetype of a purely administrative function, with no *quasi* about it, concerning which courts should not interfere save for the most glaring discrimination or abuse." *N.L.R.B. v. Olson Bodies, Inc.*, 420 F.2d 1187, 1189 (C.A. 2, 1970), cert. denied, 401 U.S. 954. The burden is on the party challenging a Board representation determination to establish an abuse of discretion, and that burden is a "heavy" one. *Shoreline Enterprises of America, Inc. v. N.L.R.B.*, 262 F.2d 933, 942 (C.A. 5, 1959). We show below that the Board did not abuse its discretion in finding that the Company failed to meet its burden in this case.

A. The Board properly overruled the Company's objection to the election

In its Objection 1 to the election the Company alleged that the results were invalid because the Union "offered to waive initiation fees for employees in the bargaining unit for membership in the union in the event the union should win the election . . ." (A. 46-47). The Regional Director's investigation revealed that the Union, at a meeting for employees held about one week before the election, responded to an employee's question about initiation fees by saying that those persons presently employed would not have to pay initiation fees (A. 55-56). In addition, the investigation revealed that a direct mailing to employees signed by the Union's Holiday Inn Organizing Committee, dated May 8, 1973, stated in part: "There is no initiation fee for those employees presently employed and no dues are paid until a contract has been proposed by yourself and ratified by yourself" (A. 56).

In overruling this objection to the election the Board distinguished *N.L.R.B. v. Savair Mfg. Co.*, 414 U.S. 270 (1973), upon which the Company relied. The Supreme Court in *Savair* considered the propriety of "a union's offer to waive initiation fees for all employees who sign union authorization cards *before a Board representation election,* if the union wins the election" (emphasis in original). 414 U.S. at 272, n. 4. The Court held that a waiver of initiation fees in such circumstances constitutes improper interference with a fair election because it "allows the union to buy endorsements and paint a false portrait of employee support during its election campaign." 414 U.S. at 277. In contrast, in the instant case the Board found that the Union's offer to waive initiation fees for those presently employed "was not conditioned upon the expression by any employee of support for the Union in any form during the electoral process" (A. 71). Further, as the Board found, "any

denial of the waiver to new employees hired after the date of the offer would not have affected the election" because those employees "would not have been eligible to vote in the election" (*ibid.*). Finally, it is significant that the Union's offer to waive initiation fees, by its terms, remained open for a period of time after the election.

It is thus apparent that the circumstances of this case are wholly distinguishable from those present in *Savair*. The distinction existing here between a waiver available to all employees which is kept open for some period of time after the election and the more restricted waiver proscribed by *Savair* has been recognized in numerous cases. See, *N.L.R.B. v. Con-Pac, Inc.*, 509 F.2d 270 (C.A. 5, 1975); *N.L.R.B. v. Wabash Transformer Corp.*, 509 F.2d 647, 649-650 (C.A. 8, 1975); *N.L.R.B. v. Stone & Thomas*, 502 F.2d 957 (C.A. 4, 1974); *N.L.R.B. v. S & S Product Engineering Services, Inc.*, No. 74-2010, decided April 10, 1975 (C.A. 6); *Endless Mold, Inc.*, 210 NLRB No. 34, 86 LRRM 1033 (1974). See also, *Altman Camera Corp., v. N.L.R.B.*, 88 LRRM 2965, 2968 (C.A. 7, February 28, 1975).

B. The Board properly found that Nichols and Hancock were supervisors and hence ineligible to vote

As indicated in the Statement, *supra*, the Company contends that the Board erred in upholding the Hearing Officer's determination that Sandra Nichols and Ruth Hancock were supervisors and hence ineligible to vote. As we show below, the Company's position is without merit. Section 2(11) of the Act defines "supervisor" to mean:

> . . . any individual having authority, in the interest of the employer, to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances or

> effectively recommend such action, if in connection with the foregoing, the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The interpretation of this statutory term calls into play the Board's "special function of applying the general provisions of the Act to the complexities of industrial life." *N.L.R.B. v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1968). As this Court has recognized in *N.L.R.B. v. Big Ben Department Stores, Inc.*, 396 F.2d 78, 82 (C.A. 2, 1968), ". . . a large measure of informed discretion is involved in the exercise by the Board of its primary function to determine those who as a practical matter fall within the statutory definition of a 'supervisor,' " citing *N.L.R.B. v. Swift & Co.*, 292 F.2d 561, 563 (C.A. 1, 1961). It is clear that the application of the statutory test for determining supervisory status lies "squarely within the Board's ambit of expertise" and therefore judicial review is limited by the "great weight" to be accorded to the Board's determination. *Oil, Chemical & Atomic Workers International Union v. N.L.R.B.*, 445 F.2d 237, 241 (C.A.D.C., 1967). Accord: *N.L.R.B. v. Metropolitan Life Insurance Co.*, 405 F.2d 1169, 1172 (C.A. 2, 1968); *N.L.R.B. v. International Metal Specialties, Inc.*, 433 F.2d 870, 872 (C.A. 2, 1970), cert. denied, 402 U.S. 907.

Inasmuch as Section 2(11) is written in the disjunctive, it is well settled that possession of any one of the listed powers is sufficient to cause the possessor to be classified as a supervisor. *Amalgamated Local Union 355 v. N.L.R.B.*, 481 F.2d 996, 999 (C.A. 2, 1973); *N.L.R.B. v. Metropolitan Life Insurance Co.*, 405 F.2d 1169, 1172 (C.A. 2, 1968). We submit that the Board properly applied the statutory standard to Sandra Nichols and Ruth Hancock and correctly sustained the challenges to their ballots on the ground that they were supervisors.

1. Sandra Nichols

At the time of the election, Sandra Nichols was one of the two full-time hostess-cashiers employed by the restaurant located at the Company's Inn. The two hostess-cashiers work on separate shifts, from 7 a.m. to 3 p.m. and from 3. p.m. to 11 p.m., respectively (A. 63; 89-90, 393). There were also one or more part-time hostess-cashiers, according to seasonal requirements (A. 63; 89, 123, 307).

Nichols began her employment at the Company's Inn as a waitress in July 1971 and became a hostess-cashier in April 1972 (A. 63; 90, 306, 307). As a waitress, she received an hourly rate of $1.22, and upon her promotion to hostess-cashier she was paid $1.77 per hour (A. 63; 92, 307). Nichols' duties as hostess-cashier included greeting restaurant patrons, seating them at tables, handing them menus, seeing to it that they were served and receiving payment from them (A. 63; 90-91, 124, 125-126). She assigned the three to six dining room waitresses to their stations and provided them with restaurant checks (A. 63; 90, 125, 164, 292, 466). Nichols prepared weekly work schedules for the waitresses after consultation with Motel Manager King and had complete authority to change those weekly schedules without notifying King (A. 63; 132, 144-145, 270-271, 278, 280, 291, 298, 313). Nichols also made up the vacation schedule and granted time off to the waitresses (A. 63; 280, 314, 334, 338). She had the authority to assign waitresses to serve at banquets, and Manager King generally approved her selections (A. 63-64; 97-98, 136-137, 142-143, 319, 320-321). Nichols' duties also included distributing paychecks to the waitresses (A. 64; 285-286, 321).

Nichols was authorized to interview applicants for waitress positions and to tell them to report for work without prior consultation with King, and on at least 12 occasions exercised this authority (A. 63; 128-129,

148-149, 269-270, 294-295, 299-300, 308, 310, 312, 317-318, 333). In September 1972, the Company placed an advertisement in the newspaper requesting that applicants for waitress positions see either King or Nichols (A. 127, 273, 316-318). On one occasion, Nichols effectively recommended the discharge of a waitress for violation of a warning notice concerning tardiness (A. 64; 129, 131-132).

The evidence of record thus discloses that Sandra Nichols played an important supervisory role in the operation of the Company's restaurant. In addition to assigning work to waitresses and arranging their schedules, she also exercised substantial responsibility in the hiring of new waitresses. She also possessed authority, which she exercised on occasion, to effectively recommend employee discharges. Since Nichols' duties and exercise of supervisory authority brought her well within the statutory definition of supervisor, the Board was warranted in holding her ineligible to vote in the election. See, *N.L.R.B. v. Scoler's Inc.*, 466 F.2d 1289, 1292, n. 3 (C.A. 2, 1972); *Olney Motels, Inc., d/b/a Holiday Inn*, 176 NLRB 903, 906 (1969); *Dunfey Family Corp., d/b/a Sheraton Motor Inn*, 210 NLRB No. 85, 86 LRRM 1224, 1227 (1974); *Manger-Savannah Corp., Inc.*, 126 NLRB 1138, 1140 (1960).

2. Ruth Hancock

Ruth Hancock was hired on June 29, 1971, to do cleaning at the Inn in preparation for its opening (A. 65; 202). After the Inn opened, she was employed there as a maid and cleaned guest rooms under the direction of Housekeeper Leola Fitzpatrick (A. 65; 202). Fitzpatrick, who has overall responsibility for the housekeeping departments of serveral Holiday Inns owned by Federated, rotates from place to place, usually spending a month or two at a time away from the Company's Inn (A. 53; 104, 168, 343). In December 1971, Fitzpatrick left the Company's Inn at Dunkirk to help open another Inn

(A. 66; 104, 168, 184). Before leaving, Fitzpatrick selected Hancock to act as her assistant and eventually take over the housekeeping department (A. 66; 99, 106-107). In Fitzpatrick's absence, Hancock assumed the job of housekeeper, a position she held for 13 months (A. 66-67; 99, 106-107, 110, 167, 170-174, 186, 200, 203, 204, 225, 344). Fitzpatrick was gone until late February 1973, and the election occurred on May 11, 1973, following her return (A. 67; 110, 186).

Upon assuming the duties of housekeeper, Hancock was placed on salary with no overtime pay, rather than the hourly wage she had formerly received as a maid (A. 66, 72, 170, 185, 199, 219). The housekeeper's duties undertaken by Hancock in Fitzpatrick's absence included obtaining from the front desk each morning the night auditor's and desk clerk's reports showing the occupancy status of rooms filled the previous night, and assigning rooms to maids for cleaning (A. 66; 205). She was also responsible for indicating on a daily housekeeping report which rooms had been cleaned and preparing for submission to the front desk a baggage report showing room occupancy at checkout time (A. 66-67; 107, 116). During Fitzpatrick's absence, Hancock made out the schedule of working hours for maids in the housekeeping department, prepared a vacation schedule for maids subject to Manager King's approval, and granted the maids time off for illness (A. 67; 115-116, 219, 220, 241, 249, 250, 255-256, 345, 349). Hancock was also responsible for obtaining a replacement if a maid did not show up for work (A. 205-206, 222). Hancock also inspected rooms after they were cleaned and supplied by the maids (A. 67; 173-174, 189, 231-232). After inspection, Hancock told the maids if their work was deficient in any respect and directed them to correct it (A. 67; 209).

N.L.R.B. v. J. W. Mays, 356 F.2d 693, 698 (C.A. 2, 1966); *Island Holidays, Ltd., d/b/a Coco Palms Resort Hotel,* 201 NLRB 522, 523 (1973); *Howard Johnson Co.,* 201 NLRB 376, 379-380 (1973); *Crumley Hotel, Inc., d/b/a Holiday Hotel,* 134 NLRB 113, 117 (1961).

CONCLUSION

For the foregoing reasons, we respectfully submit that a judgment should issue enforcing the Board's order in full.[11]

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April 1975.

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[11] As shown in the Statement, *supra,* p. 5, in addition to refusing to bargain with the Union, the Company rejected the Union's request for information concerning the employees and their working conditions -- information which the Board held was necessary and relevant to bargaining. The Board properly held the Company's refusal to furnish such information to be violative of Section 8(a)(5) and (1) of the Act. *N.L.R.B. v. Acme Industrial Co.,* 385 U.S. 432, 435-436 (1967); *Fafnir Bearing Co. v. N.L.R.B.,* 362 F.2d 716, 721 (C.A. 2, 1966); *Prudential Insurance Co. v. N.L.R.B.,* 412 F.2d 77, 83-84 (C.A. 2, 1969), cert. denied, 396 U.S. 928.

Although Hancock does some cleaning work on occasion, this does not detract from her supervisory status (A. 75; 120). For Fitzpatrick, a conceded supervisor, acknowledged that she also, at times, places missing supplies in a room and does cleaning work (A. 73; 173-174). Moreover, the fact that a portion of an individual's time is spent performing rank-and-file work does not prevent a finding of supervisory status if other statutory indicia are present. *Armco Drainage and Metal Products, Inc.*, 77 NLRB 815, 816 (1948); *Grafton Boat Co.*, 173 NLRB 999, 1005-1006 (1969). The amount of time spent doing unit work is not determinative of supervisory status, for "it is the existence of supervisory power and not necessarily the constant and continuous utilization of it which determines whether a man is a supervisor." *N.L.R.B. v. Fullerton Publishing Co.*, 283 F.2d 545, 550 (C.A. 9, 1960), and cases cited.

On the basis of this record, we submit, the Board was amply justified in finding Hancock to be a supervisor. The duties she performed while Fitzpatrick was away were admittedly those of a supervisor and those duties changed very little after Fitzpatrick's return. Upon Fitzpatrick's return, Hancock became, in effect, the assistant housekeeper, and in that capacity she shared Fitzpatrick's supervisory authority. It is clear that she did not revert to the status of a unit employee upon Fitzpatrick's return. In light of the evidence that Hancock exercised "independent judgment in ordering maids to correct deficiencies in their work," the Board found that she responsibly directed those employees (A. 72). It is further significant that Hancock continued to participate in hiring new maids, to assign work to the maids and to make out housekeeping reports, and she continued to receive a salary rather than an hourly wage. These factors, plus the fact that employees were not told that she was no longer a supervisor, strongly support the Board's determination that she was a supervisor within the meaning of the Act. See,

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	)	
Respondent.	)	

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's offset printed brief in the above-captioned case have this day been served by first class mail upon the following counsel at the address listed below:

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/s/ Elliott Moore
Elliott Moore
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.
this 16th day of April, 1975.